Supreme Court, U.S.
FILED
JAN 11 2000
CLERK

(2)

No. 99-993

In The

Supreme Court of the United States

STATE OF ARKANSAS,

Petitioner,

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a petition for writ of certiorari, filed by an attorney not authorized to represent the petitioner before this Court, validly invoke this Court's jurisdiction?

2. Has Congress authorized the State of Arkansas to impose income and sales taxes on production credit associations, which are fiscal institutions chartered by Congress and federal instrumentalities?

DISCLOSURE UNDER SUPREME COURT RULE 29.6

None of the respondents, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Production Credit Association, and Delta Production Credit Association, has a parent corporation, and no publicly held company owns 10% or more of the stock of any respondent.

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JURISDICTION

The petition for writ of certiorari in this case was filed by an attorney who may not have been authorized to represent the State of Arkansas before this Court at the time the petition was filed. The question of the attorney's authority is currently pending before the Arkansas Supreme Court. If such authority was lacking, the petition should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 2101(c):

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

12 U.S.C. § 2077:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

STATEMENT OF THE CASE

Jurisdiction

The petition for writ of certiorari omits facts which raise a threshold question regarding this Court's jurisdiction.

The decision of the Arkansas Supreme Court was issued on July 1, 1999. On September 28, 1999, a petition for writ of certiorari on behalf of the State of Arkansas was filed by Martha Grissom Hunt, an attorney with the Arkansas Department of Finance and Administration. On October 14, 1999, the Clerk's office returned the petition for writ of certiorari for failure to comply with Supreme Court Rule 33, and gave the State of Arkansas until December 13, 1999, to submit a corrected petition.

Ark. Code Ann. § 25-16-703(a), provides:

> The Attorney General shall maintain and defend the interest of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the State are involved.

On November 23, 1999, respondents filed a petition for writ of mandamus with the Chancery Court, Pulaski County, Arkansas, alleging that only the Attorney General of Arkansas is authorized to file a petition for writ of certiorari on behalf of Arkansas with this Court, and challenging Ms. Hunt's authority to file such a petition. Respondents requested the chancery court to prohibit Ms. Hunt from filing a petition for writ of certiorari in this matter. On November 24, 1999, the chancellor issued a verbal order granting respondents' petition and prohibiting the Department of Finance and Administration, and its attorneys, from filing a petition for writ of certiorari with this Court. The verbal order was subsequently reduced to writing. A copy of the chancery court's written order is included in Appendix A of this brief.

Subsequent to the issuance of the chancery court's order, the Department of Finance and Administration requested the Attorney General of Arkansas to represent the State's interest and submit the corrected petition. By letter dated December 2, 1999, the Attorney General declined the Department's request.

The Department of Finance and Administration then requested the Governor of Arkansas to appoint Ms. Hunt, the Department's attorney, to represent the State in this

matter. The Governor granted this request and executed a letter, dated December 2, 1999, authorizing Ms. Hunt to represent the State before this Court.

On December 3, 1999, the Department of Finance and Administration filed a motion in the chancery court seeking reconsideration of the chancery court's November 24, 1999 order. Upon reconsideration, a second chancellor reconfirmed that the Department of Finance and Administration, and its attorneys, lacked authority to represent Arkansas in this matter pursuant to Ark. Code Ann. § 25-16-703(a). Further, the chancery court determined that the action taken by the Governor was ineffective to divest the Attorney General of his mandatory duties and obligations under Ark. Code Ann. § 25-16-703(a). A copy of the chancery court's ruling is included in Appendix B of this brief.

On December 8, 1999, the Department of Finance and Administration filed a petition for writ of certiorari with the Arkansas Supreme Court. The petition asked the Arkansas Supreme Court to determine that Ms. Hunt had authority to represent the State of Arkansas in this matter. The Department also filed a motion for expedited consideration and application for temporary relief.

The Arkansas Supreme Court did not rule on the merits of the Department's petition for writ of certiorari, but did grant the motion for expedited consideration and stayed the chancery court's writ of mandamus and the order denying reconsideration. On the merits, the Arkansas Supreme Court ordered the parties to file briefs on the question of Ms. Hunt's authority, and to also brief

the question of whether the chancery court had jurisdiction to entertain respondents' petition for writ of mandamus. Briefs on these questions were filed on December 22 and December 29, 1999. The case was submitted to the Arkansas Supreme Court on January 6, 2000. A copy of the Arkansas Supreme Court's order is included in Appendix C of this brief. To date, the Arkansas Supreme Court has not ruled on the merits of the Department's petition.

On December 13, 1999, Ms. Hunt filed a corrected petition for writ of certiorari on behalf of the State of Arkansas with the Clerk of this Court.

The Farm Credit Amendments Act of 1985

The petition for writ of certiorari also omits certain facts relevant to a proper understanding of the 1985 amendment to 12 U.S.C. § 2098, the predecessor of the current 12 U.S.C. § 2077.[1] In response to the agricultural depression in 1985, Congress did more than merely reorganize and strengthen the Farm Credit Administration. Congress also authorized the United States Treasury to provide new federal financial assistance to the Farm Credit System. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 4.28J, 99 Stat. 1678, 1686 (1985). This new federal support was provided to avoid the risk of Farm Credit System insolvency. The Report of the House Committee on Agriculture explained:

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[1] The Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1633, redesignated Section 2098 as Section 2077 without any change to the text.

> Without question, the U.S. agriculture industry cannot afford the disintegration of the Farm Credit System. Moreover, American Society has an important stake in the continued viability of the System.
>
> These legitimate and serious concerns form the basis of the committee's action in reporting H.R. 3792.

H.R. Rep. No. 425, 99th Cong. 1st Sess. (1985), at 11.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for writ of certiorari for two reasons. First, the petition was filed by an attorney who was not authorized under Arkansas law to represent the State of Arkansas before this Court. Thus, the petition does not properly invoke this Court's jurisdiction.

Second, the decision of the Arkansas Supreme Court applied settled legal principles, and correctly determined that Congress has not authorized Arkansas to tax production credit associations. The Arkansas Supreme Court's decision is fully consistent with the decisions of this Court, the lower federal courts, and the state courts, that have considered the state taxability of fiscal institutions chartered by Congress which are federal instrumentalities.

The Petition Does Not Properly Invoke This Court's Jurisdiction

In *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88 (1994), this Court considered the effect of a petition for writ of certiorari filed by an attorney who was not authorized to represent the petitioner. That case involved a petition filed by a Federal Election Commission ("FEC") attorney on behalf of the FEC. The Court first concluded that only the Solicitor General was authorized to file a petition for writ of certiorari on behalf of the FEC. The Court then concluded that, while the Solicitor General had later authorized the FEC to represent itself before the Court, the Solicitor General's authorization came after the deadline for filing the petition for writ of certiorari and was thus ineffective to rehabilitate the original petition. The Court suggested that to permit such an after the fact authorization would be inconsistent with the time requirements of 28 U.S.C. § 2101(c). For these reasons, the Court dismissed the FEC's petition for want of jurisdiction.

In this case, respondents challenge the authority of an attorney for the Arkansas Department of Finance and Administration to represent the State of Arkansas in a petition for writ of certiorari to this Court. This is, of course, strictly a question of Arkansas law. Two separate chancellors of the Chancery Court, Pulaski County, Arkansas, have concluded that, under Arkansas law, an attorney for the Department of Finance and Administration is not authorized to file a petition for writ of certiorari to this Court on behalf of the State of Arkansas. This issue is now before the Arkansas Supreme Court.

Unless the Arkansas Supreme Court reverses the chancery court decisions and finds that Ms. Hunt, the Department's attorney, was authorized to file the petition for writ of certiorari *at the time of initial filing* on September 28, 1999, the petition should be found to be unauthorized and denied.

The Decision Below Does Not Conflict With Any Decisions of This Court, or of the Other Federal and State Courts That Have Considered the State Taxability of Fiscal Institutions Chartered By Congress Which are Federal Instrumentalities

Respondents, production credit associations, are member institutions of the Farm Credit System, chartered by Congress to provide sound and affordable credit to American agriculture. 12 U.S.C. § 2001. As recognized by Congress, the Farm Credit System is critical to the functioning of American agriculture. H.R. Rep. No. 425, 99th Cong. 1st Sess. (1985), at 11. Production credit associations are also designated by Congress as federal instrumentalities. 12 U.S.C. §§ 2071 and 2077. The Arkansas Supreme Court held that Arkansas has no power to tax production credit associations in the absence of Congressional authorization. *Appendix to petition for writ of certiorari*, at A5. Finding no Congressional authorization to tax, the Arkansas Supreme Court correctly held that production credit associations are exempt from Arkansas sales and income taxes.

It is well settled law that fiscal institutions chartered by Congress, including respondents, are exempt from state taxation in the absence of Congressional authorization to tax. This Court, and the lower federal courts, have

routinely applied this rule to determine the state taxability of federally chartered fiscal institutions.

In *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968), this Court considered the liability of a national bank for Massachusetts sales tax. The Court stated:

> A long line of subsequent decisions by this Court has firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national, banks. *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664, 668; *Des Moines Nat. Bank v. Fairweather*, 263 U.S. 103, 106; *First Nat. Bank v. Hartford*, 273 U.S. 548, 550; *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 244.

392 U.S., at 340. The Court went on to conclude that Congress had not authorized Massachusetts to impose the taxes in question.

The federal courts of appeals apply the same rule. In *United States v. State Tax Commission*, 481 F.2d 963 (1st Cir. 1973), the Court of Appeals for the First Circuit considered the state taxability of federal savings and loan associations. The court stated:

> It is true that the federal associations, being federal instrumentalities, are immune from state taxation by virtue of the Supremacy Clause, absent specific Congressional authorization. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819); *Agricultural Bank v. Tax Comm'n, supra*, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138.

481 F.2d, at 969. In *Federal Land Bank of Wichita v. Board of County Commissioners*, 788 F.2d 1440 (10th Cir. 1986), the Court of Appeals for the Tenth Circuit considered the state taxability of federal land banks which, like production credit associations, are member institutions of the Farm Credit System, and statutorily designated federal instrumentalities. The court stated:

> A state cannot tax a federal instrumentality absent permissive federal legislation. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 340, 88 S.Ct. 2173, 2174, 20 L.Ed.2d 1138 (1968).

788 F.2d, at 1441. In *United States v. Michigan*, 851 F.2d 803 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit considered the state taxability of federal credit unions. The court stated:

> In the famous case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), the Supreme Court established the doctrine of federal immunity from state taxation. In that case, the Court held that, absent Congressional consent, the federal government and its instrumentalities are immune from state taxation under the Supremacy Clause of the Constitution.

851 F.2d, at 805.

The state courts that have considered the state taxability of federally chartered fiscal institutions have also uniformly applied the rule that such entities are exempt from state tax absent Congressional authorization. For example, in *Farm Credit Services of Mid-America, ACA v. Indiana Department of State Revenue*, 705 N.E.2d 1089 (Ind.

Tax Ct. 1999), the Indiana Tax Court considered whether Indiana could tax agricultural credit associations which, like respondents, are member institutions of the Farm Credit System. The court stated the applicable test as follows:

> In *Farm Credit Services*, 677 N.E.2d at 647, the Court stated that "[t]he parties do not dispute the time-honored rule that the federal government and its instrumentalities are immune from state and local taxation absent express waiver by Congress." In this case, the Department contends that there is no such rule and that federal instrumentalities are subject to state taxation unless Congress expressly exempts them from state taxation. The Court cannot agree.
>
> The rule that the Supremacy Clause bars state taxation of federal instrumentalities, absent congressional waiver, dates from the U.S. Supreme Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

705 N.E.2d, at 1092. This decision is currently on appeal to the Indiana Supreme Court. Similarly, in *Northwest Louisiana Production Credit Association v. State of Louisiana, Department of Revenue and Taxation*, ___ So.2d ___, 1999 La. App. LEXIS 3095 (La. Ct. App. 1999), the Louisiana Court of Appeals stated with regard to the taxation of production credit associations:

> In order for federal instrumentalities such as PCAs to be subject to state taxation, Congress must enact clear waivers of their exemptions.

1999 La. App. LEXIS 3095, at 9.

In an attempt to paint a conflict between the Arkansas Supreme Court decision and those of other state courts, petitioner cites the Ohio Supreme Court decision in *Columbus Production Credit Association v. Bowers*, 180 N.E.2d 1 (Ohio 1962), *cert. denied*, 371 U.S. 826 (1962), and the California Court of Appeals decision in *Woodland Production Credit Association v. Franchise Tax Board*, 225 Cal. App. 2d 293 (1964). *Petition*, at 13. In fact, these decisions are fully consistent with the opinion below.

In *Columbus Production Credit Association*, the Ohio Supreme Court stated the guiding legal principle as follows:

> An instrumentality of the United States may not be taxed by a state unless Congress has granted consent to the state to tax.

180 N.E.2d, at 2. In *Woodland Production Credit Association*, the California Court of Appeals stated:

> Both parties agree that the association is an instrumentality of the United States. (12 U.S.C. § 1138c.) Thus its taxability is measured by the terms of congressional consent.

225 Cal. App. 2d, at 295. Thus, the decisions relied upon by petitioner to suggest a conflict apply the same legal rule as the Arkansas Supreme Court. They differ only in that they decided the taxability of production credit associations during years when Congress had actually authorized state taxation of such associations. As discussed below, pages 14-16, and as correctly found by the Arkansas Supreme Court, this Congressional authorization was subsequently repealed.

In a further attempt to create a conflict between the decision below and this Court's decisions, petitioner claims that the Arkansas Supreme Court failed to follow this Court's prior decision in this litigation, *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997). Petitioner claims that this Court's earlier opinion declared that statutory designation as a federal instrumentality is insufficient to make production credit associations exempt from state taxation, even if Congress has not authorized such taxation. *Petition*, at 18-19. Petitioner misreads this Court's decision in *Arkansas v. Farm Credit Services of Central Arkansas*.

This Court's opinion clearly states that the Court was not deciding respondents' claim of state tax exemption. 520 U.S., at 824. Rather, the Court held only that the Tax Injunction Act precluded federal court consideration of respondents' state tax exemption claim. To read the decision as enacting a new and novel legal rule for determining when federally chartered fiscal institutions, which are federal instrumentalities, are exempt from state taxation is to ignore the Court's own statements regarding the scope of its opinion. Moreover, it is to read the Court's decision as overruling *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and its progeny *sub silentio*. As the Indiana Tax Court observed in *Farm Credit Services of Mid-America, ACA*, the propriety of such a reading is "extremely unlikely." 705 N.E.2d, at 1093.

In the end, the decision by the Arkansas Supreme Court applies well settled law and involves only a question of statutory construction – has Congress authorized state taxation of production credit associations? The

Arkansas Supreme court properly answered this question in the negative.

Prior to 1985, Congress expressly authorized state taxation of production credit associations when the federal government had no investment in such associations. The authorization to tax was contained in the last sentence of 12 U.S.C. § 2098.[2] Section 2098 provided in full:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other such obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, Territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the

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[2] It is this earlier version of Section 2098 that was at issue in *Columbus Production Credit Association, supra,* and *Woodland Production Credit Association, supra,* the cases relied upon by petitioner.

> preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.

This Congressional authorization was repealed by Section 205 of the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 205, 99 Stat. 1678, 1705, which struck out the last two sentences of Section 2098.

The 1985 repeal of the states' authorization to tax production credit associations occurred simultaneously with Congressional approval of new federal investment in the Farm Credit System. However, the new federal investment was to be made indirectly through the Farm Credit System Capital Corporation, rather than directly in individual Farm Credit System institutions. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 4.28J, 99 Stat. 1678, 1686.

Congress explained the reason for amending 12 U.S.C. § 2098 as follows:

> This section also contains amendments which conform specific sections of the Act to the change made by the merger of the revolving funds and the elimination of the authority to make separate investments in individual institutions. As amended by the Act, the Farm Credit Administration may only make investments from the section 4.0 revolving fund in the Farm Credit System Capital Corporation.

H.R. Rep. No. 425, at 28-29. Thus, the amendment to Section 2098 and the repeal of the prior authorization for states to tax production credit associations reflect the introduction of new and indirect federal investment in

the Farm Credit System in place of the prior direct investments in individual institutions. In light of these circumstances, it is both logical and proper to conclude, as the Arkansas Supreme Court did, that in 1985 Congress intended that production credit associations would no longer be subject to state taxation.

CONCLUSION

For the reasons stated, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION and DELTA PRODUCTION CREDIT ASSOCIATION — PETITIONERS

vs. NO. OT99-6121

ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, a Department of the State of Arkansas — RESPONDENT

WRIT OF MANDAMUS

Now having considered the Petition for Writ of Mandamus, the Defendant's Response to the Petition for Writ of Mandamus, evidenced adduced at the hearing, the arguments of counsel, and other things before the Court, the Court finds the following:

1. The decision of the Arkansas Supreme Court in *State of Arkansas v. Farm Credit Services of Central Arkansas, et al.*, 338 Ark. 322 (1999) ("Arkansas Proceeding") is a lawsuit initially brought by the Petitioners against the State of Arkansas claiming immunity from state taxes as a Congressionally-designated federal instrumentality.

2. The Department of Finance and Administration ("Department") is an agency of the State of Arkansas. At

all times, the Department has represented the State of Arkansas in the Arkansas Proceeding. On September 29, 1999, the Department filed a Petition for Writ of Certiorari on behalf of the State with the United States Supreme Court, requesting a review of the Arkansas Proceeding decision.

3. The Arkansas Attorney General has never represented the State in the Arkansas Proceeding or in connection with the filing of the Petition for Writ of Certiorari before the United States Supreme Court.

4. Ark. Code Ann. § 25-16-703(a) provides that: "The Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the State are involved."

5. On November 23, 1999, Petitioners filed a Petition for Writ of Mandamus to prohibit the Department from defending and maintaining the State's interest before the United States Supreme Court as *ultra vires* and unauthorized by law.

6. On November 24, 1999, the Honorable Collins Kilgore, Second Division Chancellor, issued a verbal order granting the Plaintiffs' request for Writ of Mandamus to prohibit the Department and its lawyers from representing the State of Arkansas before the United States Supreme Court based upon the language of Ark. Code Ann. § 25-16-703(a).

7. On December 3, 1999, Judge Kilgore recused, prior to the entry of a written Order. This case was transferred to Sixth Division.

CONCLUSIONS OF LAW

1. This Court has jurisdiction because at the time the Writ of Mandamus was filed, the Department's representation of the State's interest before the United States Supreme Court is not authorized by Ark. Code Ann. § 25-16-703(a) and therefore *ultra vires*.

2. The provisions of Ark. Code Ann. § 25-16-703(a) are specific, clear and unambiguous. The Attorney General is the appropriate representative of the State's interest before the United States Supreme Court. The Department lacks independent authority to represent the State of Arkansas before the United States Supreme Court in this case.

3. Judge Kilgore's ruling from the bench granting petitioner's writ of mandamus on November 24, 1999 has been, and remains, in full force and effect from the time his ruling was issued from the bench.

It is CONSIDERED, ORDERED AND ADJUDGED that all of the Department's actions representing the State before the United States Supreme Court in the Arkansas Proceeding are not authorized by Ark. Code Ann. § 25-16-703(a), are *ultra vires* and that a writ of mandamus should issue prohibiting the Department and its attorneys from taking any action on behalf of the State of

Arkansas before the United States Supreme Court in the Arkansas Proceeding.

IT IS SO ORDERED, November 24, 1999.

HONORABLE MACKIE PIERCE,
CHANCELLOR

DATED: December 8, 1999

APPENDIX B

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION and DELTA PRODUCTION CREDIT ASSOCIATION — PETITIONERS

vs. NO. OT99-6121

ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, a Department of the State of Arkansas — RESPONDENT

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION, AND MODIFICATION OF, OR SUPPLEMENT, ORDER

Now having considered the Respondent's Motion For Reconsideration, And Modification Of, Or Supplement To, Order (hereinafter "Motion for Reconsideration"), the Respondent's Pretrial Brief, the arguments of counsel and other things before the Court, the Court finds the following:

1. That a Writ of Mandamus prohibiting the Department of Finance and Administration and it's attorneys ("Department") from representing the State before the United States Supreme Court against Petitioners was issued by Judge Collins Kilgore from the bench on

November 24, 1999. The Writ of Mandamus was filed on December ___, 1999, nunc pro tunc, November 24, 1999.

2. After Judge Kilgore issued the Writ of Mandamus on November 24, 1999, the Department requested that the Attorney General represent the State's interests by filing Petition for a Writ of Certiorari in the Supreme Court of the United States. By letter dated December 2, 1999, Attorney General Mark Pryor declined to represent the State's interests in this matter by filing the Writ of Certiorari.

3. By letter dated December 2, 1999, Governor Mike Huckabee executed a letter purporting to authorize the Department's lawyer, Ms. Martha G. Hunt as legal counsel to represent the State in the Arkansas Proceeding pursuant to Ark. Code Ann. § 25-16-702(c).

CONCLUSIONS OF LAW

1. Based upon Ark. Code Ann. § 25-16-703(a), the Department is not authorized to represent the State of Arkansas before the United States Supreme Court. No evidence has been presented by the Department to justify vacating the Writ of Mandamus issued in this case.

2. Ark. Code Ann. § 25-16-703(a) is mandatory, vesting the Attorney General with all power to defend and maintain the interest of the State of Arkansas before the United States Supreme Court.

3. All actions taken by the Department and the Governor pursuant to the general provisions of Ark. Code Ann. § 25-16-702(c) are ineffective to divest the Attorney

General of his mandatory duties and obligations under Ark. Code Ann. § 25-16-703(a).

The Court hereby Orders the following:

It is CONSIDERED, ORDERED AND ADJUDGED that the Respondent's Motion For Reconsideration, And Modification Of, Or Supplement To, Order is denied in its entirety.

IT IS SO ORDERED.

HONORABLE MACKIE PIERCE,
CHANCELLOR

DATED: December 8, 1999

APPENDIX C

ARKANSAS SUPREME COURT

No. 99-1432

Dick Barclay, Director, Arkansas Department of Finance & Administration, PETITIONER, V. Farm Credit Services, et al., RESPONDENT,	**Opinion Delivered December 10, 1999** PETITION FOR WRIT OF CERTIORARI; MOTION FOR EXPEDITED CONSIDERATION; APPLICATION FOR TEMPORARY RELIEF MOTION FOR EXPEDITED CONSIDERATION AND APPLICATION FOR TEMPORARY RELIEF GRANTED; BRIEFING ORDERED.

PER CURIAM

On July 1, 1999, we affirmed the chancery court's summary judgment ruling that the respondents, four Production Credit Associations, were entitled to immunity from state sales and income taxation by virtue of their status as "federal instrumentalities." *State of Arkansas v. Farm Credit Services of Central Arkansas*, 338 Ark. 322, ___ S.W.2d ___ (1999). On September 9, 1999, we granted the State's motion for stay of the mandate in that case, in order to allow the State to file a petition for writ of certiorari in the Supreme Court of the United States. Ark. S. Ct. R. 5-3(c).

On November 23, 1999, the respondents filed a petition for writ of mandamus in the Pulaski County Chancery Court, Second Division, which sought to enjoin the Department of Finance and Administration (DFA) and its attorneys from filing a petition for writ of certiorari in the Supreme Court. The respondents alleged in the petition that the DFA's actions violated Ark. Code Ann. Sec. 25-16-703(a) (Repl. 1996), which provides:

> The Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved.

On November 24, 1999, the chancellor issued a verbal order granting the respondents' request for writ of mandamus to prohibit DFA and its attorneys from representing the State of Arkansas before the Supreme Court. Following the second division chancellor's recusal on December 3, 1999, the case was transferred to the Sixth Division of Pulaski County Chancery Court. On that same day, DFA filed a motion for reconsideration and modification of the chancellor's verbal ruling. On December 8, 1999, the sixth division chancellor issued a writ of mandamus prohibiting DFA and its attorneys from taking any action on behalf of the State of Arkansas before the United States Supreme Court in *State of Arkansas v. Farm Credit Services of Central Arkansas, supra*. The chancellor also denied DFA's motion for reconsideration and modification.

DFA promptly filed a petition for writ of certiorari in this court on December 8, 1999, along with a motion for expedited consideration and an application for temporary relief. The motion to expedite consideration of this matter is granted. Pending our expedited review of DFA's petition for writ of certiorari in this matter, we stay the writ of mandamus and the order denying reconsideration entered by the chancellor on December 8, 1999, in order to permit DFA and its attorneys to file a petition for writ of certiorari in the Supreme Court by the December 13, 1999 deadline in *State of Arkansas v. Farm Credit Services of Central Arkansas, supra*. The parties are ordered to brief the issues raised in DFA's petition for writ of certiorari, as well as the basis for the chancery court's jurisdiction to issue a writ of mandamus in this matter.